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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 24 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a research associate. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement and additional evidence. For the reasons discussed below, we uphold the director's determination that the petitioner has not established his eligibility for the benefit sought. Ultimately, as will be explained in more detail below, the petitioner's primary bases for requesting the waiver, that he is an experienced microsurgeon and that the United States is suffering a shortage of workers with this skill, can be addressed by the alien employment certification process. Thus, the petitioner has not established why that process should be waived in the national interest. While one of the petitioner's references, [redacted] suggests that the waiver would allow the petitioner to adjust status in the United States without leaving to secure an immigrant visa, [redacted] does not explain this assertion. As noted by the director, the petitioner qualifies for classification as an advanced degree professional. The waiver he seeks would not afford him a higher preference.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A)

> that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Medical Science from the [redacted] The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors that U.S. Citizenship and Immigration Services (USCIS) must consider when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, the petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. We include the term "prospective" to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We concur with the director that the petitioner works in an area of intrinsic merit, rodent microsurgery, and that the proposed benefits of his work, improved understanding of neural and cardiovascular conditions, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

As stated above, [redacted] implies that the waiver would allow the petitioner to adjust status in the United States without leaving the country to obtain an immigrant visa. We reiterate that the waiver does not provide any preference benefits beyond those already available to the beneficiaries of a second preference visa petition supported by an approved alien employment certification. Moreover, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223.

The petitioner submitted evidence of [redacted] grants listing the principal investigator as [redacted] the [redacted] confirms that the petitioner participated in a collaboration with [redacted] the petitioner's [redacted] The record contains the petitioner's research article coauthored with [redacted] Most, if not all research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

The petitioner also submitted his 2007 article coauthored with [redacted] several Chinese-language articles from 1996, 1997 and 1998; a Chinese-language book chapter published, according to

the petitioner's self-serving curriculum vitae, in 2002; two presentations listing the petitioner as a coauthor and a presentation listing the petitioner in the acknowledgements. The petitioner's early work addressed renal xenotransplantation. The mere dissemination of the petitioner's work cannot demonstrate the impact of that work once disseminated.

In response to the director's request for additional evidence and again on appeal, the petitioner asserts that China has no system to track citations prior to 2000. Where required evidence does not exist or is unavailable, the petitioner must document the unavailability and submit secondary evidence. While we acknowledge that citations are not required evidence, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). The petitioner submitted no evidence that China lacks any system, including non-electronic indices, capable of tracking citations prior to 2000. Moreover, the petitioner's book chapter appeared in a 2002 book; thus, any citations of that chapter should be available.

In response to the director's request for additional evidence, the petitioner submitted three citations of his 2007 article. None of these citations cite the article for its innovations in microsurgery. Regardless, the citations all postdate the filing of the petition in July 2007. The petitioner must establish his eligibility as of that date. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). In this matter, that means that he must demonstrate his track record of success with some degree of influence on the field as a whole as of that date. All of the case law on this issue focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak,* 14 I&N Dec. at 49; *see also Matter of Izummi,* 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981) for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition.") Consistent with these decisions, a petitioner cannot secure a priority date in the hope that his recently published research will subsequently prove influential. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey,* 541 F.3d 257, 261 (4th Cir. 2008).

As the petitioner must establish eligibility as of the date of filing, *Matter of Katigbak,* 14 I&N Dec. at 49, we will also not consider the two presentations submitted in response to the director's request for additional evidence and the following evidence submitted on appeal: a 2009 young investigator award [redacted] received for a recent presentation listing the petitioner as a coauthor and an unpublished manuscript.

Initially, the petitioner submitted [redacted] results for "kidney transplantation mouse model" and "heart transplantation mouse model." The first search produced 106 results and the second search produced 456 results. In response to the director's request for additional evidence, the petitioner explained the submission of these results as follows:

> Even today, there are very limited labs or institute[s] that can perform mouse kidney transplant and/or mouse transplant surgeries that are requires [*sic*] unique microsurgery skills, broad experiences, as well as strong medical background. Attached here [is] another PubMed search result which shows: during the past 40 years, papers published all over the world about heart disease is 799800, 3122 papers involve mouse model, only 469 papers relates [to] myocardial infarction mouse model (average 14 papers/year)! It is not that researchers don't want to use [the] mouse model. It is really difficult to perform mouse heart surgery. I know a very experienced microsurgeon working on rodent heart surgeries for 35 years, has never surely seen left anterior descending (LAD) coronary artery.

The petitioner asserted that kidney surgery on a mouse is even more difficult. In support of his assertions, the petitioner submitted the results of a *PubMed* search for "myocardial infarction mouse model" reflecting 469 results.

On appeal, the petitioner discusses his "unique skills," "broad experiences" and "special trainings." The petitioner asserts that his experience and training exceeds "most of my peers and an available US worker with minimum qualifications." The petitioner submits email correspondence between the petitioner and potential employers as evidence of the shortage of available U.S. skilled microsurgeons.

Simple exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for alien employment certification. *NYSDOT,* 22 I&N Dec. at 221. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Id.* The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor and should be tested through the alien employment certification process. *Id.* at 221. Furthermore, with regard to experience, the regulations indicate that ten years of progressive experience is one possible criterion that may be used to establish exceptional ability. *Id.* at 222. Because exceptional ability, by itself, does not justify a waiver of the alien employment certification requirement, arguments hinging on the degree of experience required for the profession, while relevant, are not dispositive to the matter at hand. *Id.*

The remaining evidence consists of letters. [redacted] of [redacted] asserts that the petitioner has made "major contributions to neuroscience research and his unique skills in microsurgical techniques, which have been recognized nationally and internationally." [redacted] further states that the petitioner's work "has had significant impact on the field of his research with strong potential for appreciable improvements for science and health in the United States." USCIS need not accept primarily conclusory assertions.[1] Moreover, [redacted] does not explain why, if the petitioner's work has

[1] *1756, Inc. v. The Attorney General of the United States,* 745 F. Supp. 9, 15 (D.C. Dist. 1990).

already had a significant impact, it only has the "potential" for appreciable improvements in science and health.

More specifically, [redacted] asserts that he petitioner was "an essential contributor" to the laboratory's efforts to decipher the molecular and cellular mechanisms of myelination and demyelination and that the petitioner's "unique skills in microsurgery make him irreplaceable for our scientific programs." The petitioner, however, no longer works at the [redacted] lists several types of mouse surgery that the petitioner has performed but does not suggest that the petitioner's techniques are original or that they have influenced the field of microsurgery beyond the [redacted]

[redacted] notes that the petitioner's intracranial implantation of new glial restricted precursor cells into shiverer mice confirmed their functionality in vivo. The petitioner has not demonstrated that this work had been cited as of the date of filing or that it has subsequently been cited for an innovation in microsurgery.

[redacted] asserts generally:

> [The petitioner] has significantly advanced our understanding of the relationship between nutrition and neural stem cells during early developmental stages of [the] central nervous system, and may well lead the way towards future treatments for the neurological diseases, such as Parkinson's disease, Alzheimer disease, which is a health problem of enormous proportions in our country, especially with its aging population.

[redacted] further asserts that the petitioner was involved as "a key personnel" on [redacted]-funded research. We reiterate that most research, in order to receive funding or be accepted for publication, must present some benefit to the general pool of scientific knowledge. It does not follow that every published researcher working with a government grant who contributes to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

[redacted] also discusses the petitioner's surgical skills. As discussed at length above, special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, can be enumerated on an application for alien employment certification and does not inherently meet the national interest threshold. *Id.* at 221.

[redacted] describes "several disease rodent models by operations microsurgically" the petitioner created and continues:

> With these models, he found that deficiency of iron or thyroid hormone could greatly reduce or delay the development of [a] glial precursor cell, which result in

> demyelinaiton [*sic*] in [the] nervous system. He testify [*sic*] the roles and functions of different normal glial precursor cells and virus infected glial precursor cells in the process of repairing these cells demyelinated lesions, these results had been reported on several national symposiums. [The petitioner] and other researcher [*sic*] also testified [to] the contributions of different oncogenes on promoting formation of gliomas in [the central nervous system] that was publish[ed] this April.

[redacted] does not explain how this work has impacted the field and does not indicate whether other microsurgeons are applying the petitioner's techniques.

[redacted] states that the petitioner's "studies help us fully appreciate the unique properties of these neural stem cells, which have great relevance for understanding neurological disorders that affect millions of American people." [redacted] continues that the petitioner and his colleagues "have been exploring the enormous potential of stem cells for several years, helping lead research projects focused on new cancer treatments, the role nutrition plays in early development, and in understanding how to repair the damaged brain and nervous system." [redacted] confirms that his own laboratory received 18 animal models the petitioner created by performing a thyroidectomy on five-day old rat pups. [redacted] speculates that the studies based on these models "will help us to understand how nutrition and thyroid hormone, affect the myelination during the developmental process." The fact that one independent laboratory has utilized the petitioner's models to conduct studies that may add to the general pool of knowledge in the field does not establish the petitioner's track record of success with some degree of influence on the field as a whole.

Finally, in response to the director's request for additional evidence, the petitioner submitted a letter from [redacted] where the petitioner now works. While [redacted] notes that he has never collaborated directly with the petitioner, he acknowledges that the petitioner performed the microsurgery for one of [redacted] postdoctoral fellows. As the petitioner and [redacted] are both at [redacted] is not an independent reference. [redacted] asserts that the petitioner "is one of the few people at Stanford who can perform mouse microsurgeries, and is now responsible for providing cardiovascular disease mouse models to at least 5 laboratories." [redacted] concludes that the petitioner's research at Stanford "has greatly contributed to our understanding of cardiovascular disease. His research may lead to the discovery of novel and more effective treatments." The petitioner's cardiovascular research at Stanford, however, postdates the filing of the petition and cannot be considered evidence of the petitioner's eligibility as of that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49.

The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial

evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The letters considered above primarily contain assertions of unique skills without specifically identifying innovations and providing specific examples of how those innovations have influenced the field. Merely repeating the legal standards does not satisfy the petitioner's burden of proof.[2] The petitioner submitted only a single independent letter and while the letter establishes the practical value of the petitioner's work, this letter does not establish the petitioner's influence in the field as a whole. The petitioner also failed to submit sufficient corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters.

While the petitioner's research clearly has practical applications, it can be argued that any research, in order to receive funding or acceptance for publication, must offer new and useful information to the pool of knowledge. Ultimately, the basis of the petition is the petitioner's unique skills as a microsurgeon, skills that can be enumerated on an alien employment certification. As the petitioner has never explained why the alien employment certification cannot accommodate the petitioner's skills as a microsurgeon and address the claimed shortage of microsurgeons, he has not established that a waiver of that process is in the national interest. We reiterate that the issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *NYSDOT*, 22 I&N Dec. at 221.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than

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[2] *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc.*, 745 F. Supp. at 15.

on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.